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6 UNITED STATES BANKRUPTCY COURT  
7 FOR THE DISTRICT OF OREGON  
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9 IN RE )  
10 ANITA BUTCHAS, ) Case No. 601-68254-fra13  
11 Debtor. ) MEMORANDUM OPINION

12 A hearing was held on September 24, 2002 on creditor Kendra  
13 Park, LLC's motion to set aside the order of discharge entered on  
14 June 30, 2002 in Debtor's Chapter 13 bankruptcy case. For the  
15 reasons that follow, the motion will be allowed.

16  
17 **Background**

18 The Debtor filed her Chapter 13 case on October 29, 2001.  
19 Her schedules disclosed unsecured debts of \$898, a secured debt  
20 for an automobile loan, and debts to both Wells Fargo Home  
21 Mortgage in the amount of \$147,380 and Kendra Park, LLC in the  
22 amount of \$8,800, secured by real property at 3604 Kendra St.,  
23 Debtor's residence. Kendra Park filed a proof of claim on  
24 December 12, 2001 for its claim of \$8,978, secured by a second  
25 deed of trust on the real property. Kendra Park's proof of  
26 claim and the Debtor's confirmed plan valued the collateral at

1 \$149,000.

2       On December 26, Wells Fargo filed a motion for relief from  
3 the automatic stay, asking that it be allowed to foreclose on its  
4 collateral due to defaults by the Debtor. A hearing was held on  
5 that motion on January 16, 2002 and an order entered on January  
6 29 denying the motion on condition that Debtor make up the missed  
7 payments by a time certain and continue regular monthly payments.  
8 The Debtor's Chapter 13 plan was confirmed on January 31, 2002.  
9 It provided a monthly plan payment to the Trustee of \$350, who  
10 would pay arrearages to Wells Fargo and Kendra Park and to  
11 unsecured creditors, and for the maintenance by the Debtor of  
12 regular monthly payments to Wells Fargo, Kendra Park, and  
13 American General Finance, lienholder on Debtor's vehicle. On  
14 April 18, 2002 Wells Fargo filed a Notice of Noncompliance with  
15 the terms of the January 29 order and the stay was terminated as  
16 to Wells Fargo on April 22. Wells Fargo thereafter foreclosed on  
17 its collateral and purchased the property at the foreclosure sale  
18 for a credit bid in the amount of its claim, leaving no surplus  
19 for the junior lienholder, Kendra Park, LLC.

20       During this time, the Debtor had been making her regular  
21 monthly plan payments to the Trustee who had been paying the  
22 unsecured creditors. When all the unsecured claims known to the  
23 Trustee had been paid in full, the Trustee informed the court on  
24 June 29, 2002 that the case was ready for discharge. An order of  
25 discharge was entered by the court on June 30, 2002, and notice  
26 made to creditors of such discharge. On August 6, 2002, Kendra

1 Park filed an amended proof of claim, changing its claim from  
2 secured to unsecured, reflecting the fact that the collateral  
3 formerly securing its claim was purchased by the senior  
4 lienholder with a credit bid, leaving it with an unsecured  
5 deficiency claim. On August 22, 2002, Kendra Park filed its  
6 motion to set aside the order of discharge under FRCP 60(b), on  
7 the grounds that it was mistakenly entered.

## 8 Discussion

### 9 Claim Amendment

10 The notice of amended claim filed by Kendra Park was entered  
11 on August 12, 2002 and, pursuant to its terms, interested parties  
12 given until August 27 to object to the amendment. An order  
13 striking the document was inadvertently entered, but was set  
14 aside by order of the court on August 26. No objection to the  
15 claim amendment was received by August 27 or at any time  
16 thereafter. Absent any such objections, the amended claim was  
17 accepted as filed. The issue of the propriety of the amended  
18 claim is therefore not before the court.

### 20 Vacatur of Discharge Under Fed.R.Civ.P. 60(b)

#### 21 **A. Amended Claim**

22 In Cisneros v. USA (In re Cisneros), 994 F.2d 1462 (9<sup>th</sup> Cir.  
23 1993), a creditor filed a motion to reopen a Chapter 13 debtors'  
24 case and to vacate the bankruptcy court's previous order of  
25 discharge on the grounds of mistake. In that case, the trustee  
26 had not received notice of a proof of claim filed by a creditor.

1 The debtor made payments over a period of 16 months and the  
2 trustee made payments to all creditors which, as far as she was  
3 aware, had filed proofs claim. Neither the trustee nor the  
4 debtors inquired whether the creditor had filed a proof of claim,  
5 despite the fact that its claim was by far the largest one listed  
6 by the debtors in their schedules. At the end of 16 months, the  
7 trustee filed a Final Report and Accounting, representing that  
8 all creditors who had filed proofs of claim had been paid in  
9 full. In reliance on such report, the court entered a "full  
10 compliance" discharge under Code § 1328(a). No hearing was held  
11 on the matter, and no prior notice made to creditors.

12 In affirming the Bankruptcy Court and the Bankruptcy  
13 Appellate Panel, the Court of Appeals held that the order of  
14 discharge was entered under a misapprehension by the court as to  
15 the facts of the case. It acknowledged that "the problems that  
16 have arisen in [the] case are ultimately attributable to the  
17 failure of the Trustee to learn that the [creditor] had filed a  
18 proof of claim," but "[h]ad the court been apprised of the actual  
19 facts, it would never have entered the order." Cisneros at 1467.  
20 "In our view, this is precisely the sort of 'mistake' or  
21 'inadvertence' that Rule 60(b) was intended to reach. Since 'no  
22 intervening rights have become vested in reliance on the order,'  
23 there is no obstacle to the bankruptcy court's invocation of the  
24 rule to correct itself." Id. (internal citation omitted).

25 While the amended proof of claim had not yet been filed in  
26 the instant case at the time the discharge order was entered, the

1 facts are similar enough to those of Cisneros to warrant the same  
2 result. At the time the Trustee notified the court that the case  
3 was ready for discharge, he was unaware that Kendra Park had, or  
4 soon would have, an unsecured deficiency claim<sup>1</sup>. Nor was prior  
5 notice given to creditors, with an opportunity to object, that an  
6 order of discharge was to be entered in the case. Had the court  
7 known that a claim originally treated as fully secured was soon  
8 to be amended and changed to unsecured, it would not have entered  
9 the order of discharge under the circumstances. A similar result  
10 was obtained with facts similar to those of Cisneros in In re  
11 Avery, 272 B.R. 718 (Bankr. E.D. Cal. 2002).

12 **B. Failure to Make All Payments Under Plan**

13 Code § 1328(a) provides: "As soon as practicable after  
14 completion by the debtor of all payments under the plan . . . the  
15 court shall grant the debtor a discharge of all debts provided  
16 for by the plan . . . ." Paragraph 4 of Debtor's confirmed plan  
17 provides that

18 The debtor shall pay directly to each of the following  
19 creditors [including Kendra Park, LLC], whose debts are  
20 either fully secured or are secured only by a security  
interest in real property that is the debtor's

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21 <sup>1</sup> It was not disclosed during the hearing on this matter the  
22 date that the foreclosure sale occurred which resulted in Kendra  
23 Park's deficiency claim. Relief from stay had been granted to  
24 Wells Fargo, the senior lienholder, more than two months prior to  
25 the date that the Trustee informed the court that the case was  
26 ready for discharge, however, so it is probable that the sale had  
already occurred by that time. I do not mean to insinuate that  
the Trustee's actions were in any way deficient in this matter,  
especially given the large number of cases he administers and the  
fact that Kendra Park's proof of claim had not yet been amended  
by the time other unsecured creditors had been paid in full.

1 principal residence, the regular payment due  
2 postpetition on these claims in accordance with the  
terms of their respective contracts. . . .

3 Payments due under ¶ 4 of the Debtor's Plan are "payments under  
4 the plan" for purposes of Code § 1328(a). At the time the court  
5 entered the Debtor's discharge, Debtor had failed to make all  
6 payments under the plan, because the Plan provided that the  
7 Debtor would pay to Kendra Park its monthly contractual payments  
8 over the life of the Plan. Moreover, Debtor had failed to make  
9 regular monthly payments due Kendra Park after Wells Fargo  
10 obtained relief from the automatic stay and prior to the entry of  
11 the order of discharge. Debtor was therefore not eligible to  
12 obtain a discharge under Code § 1328(a) because Debtor was  
13 required to continue to make the monthly contractual payments to  
14 Kendra Park pursuant to the terms of ¶ 4 of her Plan. The court  
15 was thus mistaken in entering Debtor's discharge when it did.

16 **Conclusion**

17 Because the court entered the order of discharge in this  
18 case under a mistake of fact, and because no evidence was  
19 presented at the hearing on this matter of intervening rights  
20 having become vested in reliance on the order, the order granting  
21 discharge should be vacated under Fed.R.Civ.P. 60(b). An order  
22 consistent with the foregoing will be entered.

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25 FRANK R. ALLEY, III  
26 Bankruptcy Judge